Supreme Court

October Term, 1915

Norman Sue, Appellant,

vs.

The City of Seattle, Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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No._____

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MOTION TO DISMISS OR AFFIRM

The appellee, The City of Seattle, moves the court to dismiss the appeal herein on the ground that it does not present a substantial federal question, or in the alternative affirm the judgment of the Supreme Court of the State of Washington on the ground that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

STATEMENT

This action was brought by the appellee, The City of Seattle, against appellant by reason of appellant's refusal to admit a fire inspector into his warehouse, a business property, for an inspection for fire and explosion hazards

pursuant to the provisions of the Seattle Fire Code, Ordinance No. 87870.

ARGUMENT

It is submitted that the decision of the Supreme Court of the State of Washington sustaining appellant's conviction for refusing to permit such inspection is entirely correct, *Seattle v. See*, 67 W.D.2d 465, 408 P.2d 262.

The cases of *Frank v. Maryland*, 359 U.S. 360, 3 L Ed. 877, 79 Sup. Ct. 804, and *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 3 L Ed.2d 1200, 79 Sup. Ct. 978, which upheld inspections of *private residences*, rather than warehouses, are dispositive of appellant's Jurisdictional Statement and compel dismissal of the appeal or affirmance of the judgment herein.

In the *Frank* case a conviction was sustained under a Baltimore ordinance which authorized the health officer to demand entry to "any house, cellar or enclosure" either as a matter of systematic area by area search or to treat a specific problem of rat infestation whenever he had cause to suspect that a nuisance existed.

By Justice Frankfurter the court stated, "Inspection without a warrant as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law has antecedents deep in our history." At page 372 the court continued:

"The power here challenged rests not only on a long history of its exercise. It is a power which was continually strengthened and applied to wider concerns through the very years when the right of individuals to be free from peremptory official invasion received increasing legislative and judicial protection. . . . The growth of cities, the crowding of populations, the increased awareness of the responsibility of the state for the living conditions of its citizens, all have combined to create problems of the enforcement of minimum standards of far greater magnitude than the writers of these ancient inspection laws ever dreamed. Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health, a power that would be greatly hobbled by the blanket requirements of the safeguards necessary for a search of evidence of criminal acts. . . . Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting that need by means that history and dominant public opinion have sanctioned."

In *Ohio ex. rel. Eaton v. Price*, 360 U.S. 246, 3 L Ed. 1200, 79 Sup. Ct. 978 (1959), the defendant had been convicted of violating a city ordinance by refusing to admit three housing inspectors into his *home* to check for compliance with minimum health and safety standards. An entire neighborhood was there being investigated and inspected as part of a blanket program. Neither a search warrant nor a showing of probable cause was required.

Two state court opinions have followed *Frank* and *Eaton*: *City of St. Louis v. Evans*, 337 S.W.2d 948 (Mo. 1960) and *Camera v. Municipal Court of City and County of San Francisco*, 46 Cal. Rept. 585 (1965); see also *Dederick v. Smith*, 184 Atl. 595 (N.H. 1936); *Hubbell v. Higgins*, 126 N.W. 914 (Iowa 1910). In *Givner v. State*, 124 A(2d) 764 (Md. 1950), the court upheld a right of access to each of three inspectors, from city health, building and fire departments, stating at p. 775:

> "(T)hese inspections are of a routine nature, are to be made at reasonable hours, and are primarily for protective, not punitive purposes. In these circumstances, we consider these inspections reasonable."

The Washington State Supreme Court in making its decision carefully considered the question whether the inspection for fire hazards authorized by Ordinance 87870 contravenes the prohibition of the United States Constitution against unreasonable searches and seizures, and in deciding that it did not, made the following pertinent observations:

> "This case does not involve the search of evidence for criminal acts, but even the safeguards necessary for *such* evidence are not so stringent with reference to premises other than a man's home or dwelling.
>
> "The United States Supreme Court has applied different standards of reasonableness to searches of dwellings than to places of business. *Davis v. United State*, 328 U.S. 582, 90 L.Ed. 1453, 66 Sup. Ct. 1256 (1946)." (*Seattle v. See*, 67 W.D.2d 465, 473; 408 P.2d 262, 267)

"The ordinances in question authorize the fire chief to 'enter all buildings and premises except the interior of dwellings as often as may be necessary' for finding and correcting any conditions liable to cause fires. No criminal charge is to be made upon discovery of a fire hazard. The code provides instead that whenever the fire chief finds in any building or upon any premises dangerous or hazardous conditions he 'shall order such dangerous conditions or material to be removed or remedied in such manner as may be specified.' An 'order for correction' is then served upon the owner or occupant of the premises. But it should be noted that an inspection in the present case was only for discovery of fire hazards. No evidence would be seized for use in court and there was no threat of criminal penalty even if fire hazards were detected.

"Section 8.01.010 of the fire code, *supra*, prescribes minimum standards for the safeguarding of life and property in the use and occupancy of buildings other than dwellings. The purpose of the fire code inspections is to correct conditions hazardous to life and property. The problem of keeping cities and their inhabitants free from explosions and fires is a serious task facing all fire departments." (*Seattle v. See*, 67 W.D.2d 465, 474, 475; 408 P.2d 262, 267, 268)

It is interesting to note that the appellant does not question the propriety of the safety standards imposed by the Seattle Fire Code or the desirability of implementing a comprehensive fire prevention program through regular and routine inspections of commercial premises which are frequently used for the storage of combustible materials.

The ordinance in question regulating the inspection of buildings for fire hazards and establishing procedures

for the forced elimination of such hazards, is clearly within the municipal police power under Art. XI, Sec. 11 of the Washington Constitution which empowers municipalities to enact ordinances for the protection of the public health and safety. *Everett v. Unsworth*, 57 Wn.2d 760, 344 P.2d 729 (1959). Fire regulations are a classic example of such legislation. Seattle has had a Fire Code since its beginning and since at least 1889 has provided for inspections such as are here questioned. See *Seattle v. Hinckley*, 40 Wash. 468, 82 Pac. 747, upholding a requirement that all buildings within a certain area be supplied with fire escapes.

In practice, inspection of commercial buildings is a routine everyday occurrence, consisting simply of a visit and a tour by an experienced fire inspector of the Seattle Fire Department, and in 1962, as an example, 16,000 such inspections were made. These inspections have resulted in a substantial decrease in fire hazards and, therefore, in fire loss. Seattle occupies an enviable position in this regard since its annual per capita fire loss has consistently been a fraction of the national per capital fire loss, e.g. $2.26 in 1962 as opposed to the national per capita loss of $7.19. The National Fire Prevention Association made a study of over 2,000 fires from 1953 to 1961 and reported in the Fire Protection Handbook, 12th Ed., 1962, pages 1-32 to 1-35 that the major contributing causes of such fires were structural defects, improper handling and storage of combustible contents,

and weaknesses in private fire protection devices. These deficiencies could have been discovered by inspection and corrected by proper fire prevention practices. The importance of an effective fire prevention program cannot be over-emphasized and, as stated by the Washington court:

> "It is obvious that routine inspections are necessary to insure the safeguarding of life and property. The need to conduct routine inspections of commercial premises, in regard to which probable cause for the issuance of a warrant could not ordinarily be established, outweighs the interest in privacy with respect to such premises. The purpose of the inspection contemplated by the code is not unreasonable." (*Seattle v. See*, 67 W.D.2d 465, 475; 408 P.2d 262, 268)

Appellant's argument in support of jurisdiction herein which is set forth at pages 5 to 9 of his Jurisdictional Statement is to the effect 1.) that *Frank v. Maryland*, 359 U.S. 360, 3 L.Ed.2d 877, 79 Sup. Ct. 804, is not in point since the power of inspection in that case was "strictly limited"; 2.) that the court below improperly relied on *Davis v. United States*, 328 U.S. 582, 90 L.Ed. 1453, 66 Sup. Ct. 1256 (1946) in observing that this court has applied different standards of reasonableness to searches of dwellings than to places of business; and 3.) that the *Frank* case should be overruled. These points will be considered in the order stated.

The power of inspection granted by Ordinance 87870 in the case at hand is limited in many of the same ways as the Baltimore ordinance under consideration in the

Frank case, which, as Justice Frankfurter observed at p. 336 of the decision, was "more exacting than the analagous provisions of many other municipal codes." As to the points of similarity, an inspection under the Seattle Fire Code, as under the Baltimore ordinance, is merely conducted "to ascertain the existence of evils to be corrected upon due notification, or in default of such correction, to be made the basis of punishment" (*Frank v. Maryland*, 359 U.S. 360, 362) and, as in the *Frank* case, entry cannot be forced in the face of a refusal of inspection by the occupant. Although there is no "daytime" inspection restriction in the Seattle ordinance it could well be that one was not considered necessary since dwellings are not covered and most other premises are only occupied in the daytime anyway. The Baltimore ordinance required grounds for suspecting the existence of a nuisance as a basis for inspection, but it must be borne in mind that a private dwelling was there involved and that stricter requirements of reasonableness are applied to searches of dwellings than to places of business. As stated in Davis, Federal Searches and Seizures, § 1.31, p. 8:

> "The requirements of the Fourth Amendment receive their strictest application when a dwelling house is involved in a search. This fact is based on the traditional concept of the sanctity of the home and the peaceful enjoyment of its privacy."

Appellant seeks to evade the effect of this observation by quoting at page 7 of its brief from the *dissent* in *Davis*

v. United States, 328 U.S. 582, 90 L.Ed. 1453, 66 Sup. Ct. 1256 (1946), a case in which the court upheld a conviction for unlawful possession of gasoline rationing stamps seized in a search of defendant's station, and noted the difference between a private residence and a place of business in distinguishing an unlawful search and seizure case involving a private residence.

Finally, appellant at page 9 of his brief states that he "seeks reversal of *Frank* as an unwarranted and dangerous intrusion upon the Fourth Amendment," apparently tacitly conceding that *Frank,* unless overruled, requires dismissal of this appeal or affirmance of the judgment entered herein. However, aside from his conclusion that the *Frank* case is an "unwarranted and dangerous intrusion," the only reason advanced by appellant for overruling that decision is that it has been seven years since *Frank* and *Eaton* were decided and that

> "In the intervening years, decisions of this Court have cast substantial doubt on the continuing viability of the indulgent view of the Fourth Amendment reflected in *Frank* and *Eaton,* See, e.g., *Marcus v. Property Search Warrant,* 367 U.S. 717 (1961); *Mapp v. Ohio,* 367 U.S. 643 (1961); *Ker v. California,* 374 U.S. 23 (1963); *Stoner v. California,* 376 U.S. 483 (1964); *Beck v. Ohio,* 379 U.S. 89 (1964); *Stanford v. Texas,* 379 U.S. 476 (1965)."

The problem with this contention is that none of the above cited cases are in point in the case at hand. *Beck* and *Stoner* involved unlawful criminal searches; *Marcus* involved the constitutionality of procedures relating to

the sizure of allegedly obscene publications; *Mapp* applied the exclusionary sanctions of the Fourth Amendment to state cases; *Ker* involved the validity of an arrest and search in a possession of marijuana prosecution; and *Stanford* involved a search of the defendant's private residence and seizure of books and papers found therein pursuant to the Texas "Suppression Act." *Frank v. Maryland* is not even mentioned in *Beck* and *Stoner*, and the references to the *Frank* decision, and principally to its dissent, contained in the other cases, in no way cast "substantial doubt on the continuing viability" of that decision and are for the most part rather general allusions thereto.

CONCLUSION

It is submitted that under *Frank v. Maryland*, 359 U.S. 360, 3 L.Ed. 877, 79 Sup. Ct. 804 and *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 3 L.Ed.2d 1200, 79 Sup. Ct. 978, the Seattle Fire Code, Ordinance 87870, constitutes a reasonable exercise of the municipal police power in seeking to provide for the discovery and correction of fire hazards by means of the inspection of premises other than dwellings, and that such inspection is not violative of either the Fourth Amendment of the United States Constitution or Article I, § 12 of the Washington State Constitution.

The appeal should be dismissed or the judgment below affirmed.

Respectfully submitted,

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